No. 93-44

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal From The United States District Court For The District Of Columbia

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BRIEF FOR APPELLANTS DISCOVERY COMMUNICATIONS, INC. AND THE LEARNING CHANNEL, INC.

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QUESTION PRESENTED

This case is a constitutional challenge to the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992, §§ 4 & 5, Pub. L. No. 102-385, 106 Stat. 1471-1481. The question presented is whether Congress, consistent with the First Amendment, may require that operators of cable television systems devote a specified portion of their channels to programmers favored by Congress—*i.e.*, local broadcast stations—regardless of the preferences of the operators and regardless of the effects on other, unfavored, programmers.

PARTIES TO THE PROCEEDING

A list of the parties to the proceeding in the district court is set forth at J.S. ii-iii. Appellants' Rule 29.1 disclosure statements are set forth at J.S. App. 111a-117a.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT:	
A. Parties to the proceeding	2
B. Background of the must-carry regime	4
1. Original must-carry rules	4
2. The *Quincy* decision	6
3. The FCC's response to *Quincy*	9
4. The *Century* decision	12
C. The 1992 Cable Act	15
D. The decision below	17
INTRODUCTION AND SUMMARY OF ARGUMENT	20
ARGUMENT:	
I. The must-carry provisions are subject to exacting First Amendment scrutiny	22
A. The must-carry provisions are content-based	23
B. The must-carry provisions fall within no category of speech restriction that is exempt from strict scrutiny	32
II. The must-carry provisions are unconstitutional under the *O'Brien* test	35
A. The government has not demonstrated a substantial interest	36
B. The must-carry provisions are not narrowly-tailored	44
CONCLUSION	51

TABLE OF AUTHORITIES

Cases: Page

Associated Press v. United States, 326 U.S. 1 (1945) 32

Board of Trustees, SUNY v. Fox, 492 U.S. 469 (1989) 36,45,47

Buckley v. Valeo, 424 U.S. 1 (1976) 24,25

Burson v. Freeman, 112 S.Ct. 1846 (1992) 23,30

Cammarano v. United States, 358 U.S. 498 (1959) 26

Central Hudson Gas & Elec. Co. v. Public Service Comm'n, 447 U.S. 557 (1980) 32

Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C Cir.), *cert. denied*, 486 U.S. 1032 (1988) ..... *passim*

Chesapeake & Potomac Tel. Co. v. United States, No. 92-1751-A (E.D. Va. Aug. 24, 1993) 32,33

City of Cincinnati v. Discovery Network, Inc., 113 S.Ct. 1505 (1993) 23,26,31,45

Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) 22,33

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 30,34

Daniels Cablevision, Inc., et al. v. United States, Nos. 92-2292, 92-2494 & 92-2558 (D.D.C. 1993) 18

Edenfield v. Fane, 113 S.Ct. 1792 (1993) 36,37,42,44

FCC v. League of Women Voters, 468 U.S. 364 (1984) 32

FCC v. Midwest Video Corp., 140 U.S. 689 (1979) 6

Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) 30

Table of Authorities Continued

Page

Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.) (*per curiam*), *cert. denied*, 434 U.S. 829 (1977) 6,7,25,32,36

Leathers v. Medlock, 111 S.Ct. 1438 (1991) 25,26

Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) 24

Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) 26

Preferred Communications, Inc. v. Los Angeles, 754 F.2d 1396 (9th Cir. 1985), *aff'd on other grounds*, 476 U.S. 488 (1986) 32

PruneYard Shopping Center v. Robbins, 447 U.S. 74 (1980) 47

Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) ..... *passim*

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 32

Regan v. Taxation with Representation, 461 U.S. 540 (1983) 26

Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 29,30,31

Riley v. National Fed. of the Blind, 487 U.S. (1988) 23,24,47

Simon & Schuster, Inc. v. New York Crime Victims Bd., 112 S.Ct. 501 (1991) 23

Texas v. Johnson, 491 U.S. 397 (1989) 23

Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) 33,47,48

United States v. Midwest Video Corp., 406 U.S. 649 (1972) 6

United States v. O'Brien, 391 U.S. 367 (1968) ..... *passim*

United States v. Southwestern Cable Co., 392 U.S. 157 (1968) 6

Page

Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 30

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 29,30,31,36

Wooley v. Maynard, 430 U.S. 705 (1977) 34

Constitution, Statutes and Regulatory Materials:

U.S. Const., Amend. I ..... *passim*

Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2782 5

Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949, § 16(a) 27

Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1500:

§ 2(a)(8)(B) 26

§ 2(a)(10) 26

§ 2(a)(11) 19,26

§ 2(a)(14) 41

§ 2(a)(15) 41

§ 2(a)(16) 15,37,41

§ 2(a)(17) 49

§ 2(a)(18) 15,49

§ 2(a)(19) 39,42

§ 2(b)(1) 37

§ 3(b)(7)(A) 16

§ 4(b) 15,16

§ 4(b)(6) 16

§ 4(b)(7) 15

§ 4(c) 17

§ 4(g)(2) 46

§ 4(h)(1) 17

Page

§ 4(h)(1)(C)(ii)(III) 28

§ 4(h)(2)(B) 28

§ 5(b) 15,16,17

§ 5(c) 17

§ 5(g)(5) 16

§ 5(h) 15

§ 6 16,38,42

§ 9 48

§ 23 1

28 U.S.C. § 1253 2

28 U.S.C. § 2284 1

47 U.S.C. § 303(b) 27

47 U.S.C. § 312(a)(7) 27

47 U.S.C. § 315(a) 27

47 U.S.C. § 532 47

47 CFR §§ 15.115 & 15.117 12

47 CFR § 73.1944 27

47 CFR § 73.1930 27

47 CFR § 73.1920(a) 27

47 CFR § 76.66 12

47 CFR §§ 76.57-76.61 (1984) 4

50 Fed. Reg. 48232 (1985) 9

Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 1 FCC Rcd. 864 (1986), *on reconsideration*, 2 FCC Rcd. 3593 (1987) 9,10,11,12,33,46,49

Cable Television Service; Cable Carriage of Home Shopping Broadcast Stations, 58 Fed. Reg. 39156 (1993) 46

	Page
Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, 71 FCC 2d 632 (1979)	5,7
Must Carry Second Further Notice of Proposed Rulemaking, 6 FCC Rcd. 4545 (1991)	15,43
Report and Order, MM Docket No. 83-670, 98 FCC 2d 1076 (1984)	27
Second Report and Order, Docket No. 14895, 2 FCC 2d 725 (1966)	4
Miscellaneous:	
CableFax, Sept. 8, 1993	49
Cable Networks Inc., "Final Retransmission Consent/Must-Carry Survey (released Oct. 19, 1993)	43
Cable World, Sept. 13, 1993	43
Cable World, Oct. 18, 1993	49
Cable World, Nov. 1, 1993	39,43
Dealerscope Master Catalogue, June 1993	48
Electronic Media, Sept. 2, 1991	39
Electronic Media, Oct. 18, 1993	39
FCC News Release: Broadcast Station Totals as of December 31, 1992 (Jan. 13, 1993)	39
FCC News Release: Broadcast Station Totals for July 1985 (Aug. 9, 1985)	39
Financial Times, Oct. 19, 1993	39
H.R. Rep. 102-628, 102d Cong., 2d Sess. (1992)	28,40,48,49,50
Hearing Before the Subcomm. on Communications of the Senate Commerce Comm., 101st Cong., 1st Sess. (Oct. 25, 1989)	29
Office of Communications of the United Church of Christ, *The Public Cost of TV Deregulation: A Study of the Decline of Informational Programming on Commercial* (June 17, 1991)	45
S. Rep. 102-92, 102d Cong., 1st Sess. (1991)	28,40,41,47,48,49,50

	Page
Setzer & Levy, "Broadcast Television in a Multichannel Marketplace," FCC Office of Plans and Policy (June 1991)	45
Standard & Poor's, *Daily Stock Quotations, NYSE*, vol. 3 (1986)	39
Wall St. J., Sept. 27, 1993	43
Wall St. J., Oct. 14, 1993	39
Wall St. J., Nov. 1, 1993	40
Wall St. J., Nov. 2, 1993	39
Wall St. J., Nov. 3, 1993	39

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BRIEF FOR APPELLANTS DISCOVERY COMMUNICATIONS, INC. AND THE LEARNING CHANNEL, INC.

OPINION BELOW

The opinion of the district court (J.S. App. 1a-72a) is reported at 819 F. Supp. 32.

JURISDICTION

These consolidated cases were heard by a three-judge district court under 28 U.S.C. § 2284 and section 23 of the Cable Television Consumer Protection and Competition Act of 1992 ("the Act"), Pub. L. No. 102-385, 106 Stat. 1500, 47 U.S.C. § 555(c)(1). The district court's judgment was entered on April 8, 1993. Notices of appeal to this Court (J.S. App. 73a-81a) were timely filed on May 3, 1993; the juris-

dictional statement was timely filed on July 2, 1993; and this Court noted probable jurisdiction on September 28, 1993. Its jurisdiction rests on 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law * * * abridging the freedom of speech, or of the press." Relevant provisions of the Act are reprinted at J.S. App. 82a-110a.

STATEMENT

A. Parties to the Proceeding

Discovery Communications, Inc. ("Discovery") is a cable programmer: it creates video programming and distributes that material through cable systems nationwide. It operates The Discovery Channel and, through a subsidiary, The Learning Channel. Both are dedicated to the provision of high-quality documentary and educational programming aimed at people who watch television to broaden their understanding and appreciation of the world. J.A. 285.

Discovery was founded in 1985 and, in the climate of cable deregulation, it flourished. As of February 1993, it had grown to become the fifth largest cable network on a viewership basis, with about 59 million viewing subscribers, or 96% of all televisions wired for cable. J.A. 284-285. The Discovery Channel provides 18 hours of programming daily, featuring nonfiction documentaries about nature, science, human events, and history. Its award-winning programs include "In the Company of Whales" (hosted by a prominent cetacean biologist), "Portrait of a People" (examining endangered cultures like the Wodaabe tribe), and "Invention" (an investigation of scientific ingenuity produced jointly with the Smithsonian Institution). J.A. 285.

Discovery also dedicates programming to social issues and public affairs. A weekly feature called "Discovery Journal"

has covered such topics as capital punishment, overpopulation, famine in Africa, and AIDS. "Assignment Discovery" consists of teaching materials and a commercial-free documentary library that is made available to schools free of charge. In February 1992, to counterbalance conventional broadcasters' sound-bite coverage of the presidential primaries, Discovery provided a block of 20 minutes free time to each major candidate; more than 1.5 million people watched the candidates in a forum anchored by Walter Cronkite. J.A. 285.

Discovery acquired The Learning Channel ("TLC") in early 1991. TLC was relaunched in October 1991 following a $43 million investment made to upgrade its programming. J.A. 149. In February 1993, TLC was carried on 15% of U.S. cable systems and had about 18 million subscribers. J.A. 150. As a start-up channel, it usually competes for one of the last available spaces on a cable operator's system. J.A. 152, 208.

TLC produces educational programs for viewers of all ages. Each weekday, its schedule includes six hours of commercial-free programming for pre-school children called "Ready, Set, Learn." For older children, TLC offers "Mad Math" and "The Learning Channel Elementary School"; the latter provides teachers with copyright-cleared material that may be taped for classroom use. Weekly programs such as "A Practical Guide to the Universe" and "Ten Great Writers" are keyed to high-school students. J.A. 150-151. Following consultations with the Library of Congress, TLC in September 1993 launched its "Great Books" series, with Walter Cronkite serving as executive editor.

TLC also offers educational programming for adults. A weekly series called "No Problem" helps Spanish-speaking people improve their English. "Learn to Read" gives adults the opportunity to achieve greater literacy in the privacy of their homes. "Teacher TV" is produced by, for, and about teachers; it covers such topics as school reform, educational innovation, and teacher training. TLC's prime-time programming features documentaries about history, science, an-

thropology, and culture, such as "Archaeology," "Ancient Journeys," "Civilization," and "Science Frontiers." J.A. 151, 208-209.

B. Background of the Must-Carry Regime

As the district court observed, "[t]he concept of governmentally ordained mandatory carriage of broadcast signals is not a novel threat to the cable industry" (J.S. App. 8a). Since 1962, "[m]ust-carry rules in various forms have been major tools in [the government's] campaign to protect local broadcasting from cable." *Century Communications Corp. v. FCC*, 835 F.2d 292, 294 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988). A review of these previous regulatory schemes provides a useful backdrop for analyzing the must-carry provisions of the 1992 Act.

1. *Original Must-Carry Rules.* The FCC first experimented with must-carry rules in the early 1960s and made them applicable to all cable operators in 1966. *Second Report and Order, Docket No. 14895*, 2 FCC 2d 725 (1966). These rules required cable systems to transmit to their subscribers, upon request and without compensation, every over-the-air television broadcast signal that was "significantly viewed in the community" or otherwise considered "local" under FCC rules. *See* 47 CFR §§ 76.57-76.61 (1984). There was originally no limit (apart from the system's channel capacity) on the number of broadcasters that had to be carried.

However offensive in principle, the must-carry rules in their earliest incarnation were not very onerous in practice to "community antenna television" (CATV), as the cable industry was then called. No cable program networks existed at that time, and cable operators virtually never originated their own programming. J.A. 61. Because the only video programming available for carriage on cable systems was then supplied by broadcast stations, the practical effect of the earliest must-carry rules was nondiscriminatory. They required cable operators to transmit the signals of all then-existing video programmers—*viz.*, broadcast TV stations—on an even-handed basis.

When first issuing must-carry rules, the FCC perceived cable as a passive retransmitter of signals—a supplementary system for delivering broadcast television in hard-to-reach areas. But during the 1970s its approach changed, and it gradually came to recognize cable's potential as an independent medium for providing the public with a wide range of alternative video choices. *Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television* ("*Economic Inquiry Report*"), 71 FCC 2d 632, 645-646 (1979). The FCC accordingly embarked on a deregulatory process that eliminated many artificial constraints on the cable industry's growth. Congress continued and expanded this process in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779.

In this deregulatory environment, cable programming networks began to flourish; with their growth, the must-carry rules became concomitantly more oppressive. Unlike broadcasters, cable programmers have no access to the airwaves; a cable programmer cannot survive if it fails to gain access to a significant number of cable systems. Depending on the channel capacity of particular systems, the must-carry rules made it difficult or impossible for many fledgling programmers to secure an audience. With the growth of cable program networks, in short, the must-carry rules lost their "equal access" character and became a regime of preferential access, systematically discriminating against cable networks in favor of their broadcast competitors.

In 1980, Turner Broadcasting System, a pioneer in cable programming, challenged the must-carry rules by filing a rulemaking petition with the FCC. The Commission temporized for four years; finally, under threat of litigation, it issued in 1984 a brief memorandum refusing to modify the rules. Turner sought review in the D.C. Circuit, which consolidated the case with that of a cable operator from Quincy, Washington. In 1985, the D.C. Circuit thus became the first court to consider the constitutionality of the must-carry rules. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).[1]

[1] This Court had previously encountered the FCC's must-carry rules

2. *The Quincy Decision.* In an opinion written by Judge Wright and joined by Judge (now Justice) Ginsburg and Judge Bork, the D.C. Circuit in *Quincy* unanimously held that the FCC must-carry rules violated the First Amendment. The court found no need to decide whether the rules should be examined under traditional "strict scrutiny" or under the test for "incidental" burdens on speech set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). While expressing "serious doubts about the appropriateness of invoking *O'Brien*'s interest balancing formulation," the court concluded that "the rules so clearly fail under that standard that we need not resolve whether they warrant a more exacting level of First Amendment scrutiny." *Quincy*, 768 F.2d at 1448.

At the outset, the court declined to extend to cable "the First Amendment jurisprudence that has developed around challenges to FCC regulation of broadcast television and radio" (768 F.2d at 1448). "[T]he First Amendment tolerates far more intrusive regulation of broadcasters than of other media," the court stated, "precisely because of the inescapable physical limitations on the number of voices that can simultaneously be carried over the electromagnetic spectrum" (*ibid.*). The broadcast analogy, Judge Wright concluded, "has no place in evaluating government regulation of cable" because the " 'essential precondition of that theory—physical interference and scarcity requiring an umpiring role for government—is absent.' " *Id.* at 1449, quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 44-45 (D.C. Cir.) (*per curiam*), *cert. denied*, 434 U.S. 829 (1977).

In deciding whether to apply "strict scrutiny" or the less demanding *O'Brien* test, the court characterized the must-carry restrictions as "a far cry from [those] that typically

(among others) in a series of cases concerning the breadth of the Commission's jurisdiction to regulate cable. But the Court expressly declined to address questions concerning those rules' constitutionality, while observing that such questions were "not frivolous." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 709 n.19 (1979) ("*Midwest II*"); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) ("*Midwest I*"); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167 (1968).

have been viewed as imposing a merely 'incidental' burden on speech" (768 F.2d at 1451). "Although not intended to suppress or protect any particular viewpoint, the rules [were] explicitly designed to 'favor certain classes of speakers over others.' " *Ibid.*, quoting *Home Box Office*, 567 F.2d at 48. The rules' "very purpose," the court observed, was "to bolster the fortunes of local broadcasters" by guaranteeing them "the right to convey their messages over the cable system while cable programmers must vie for a proportionately diminished number of channels." *Quincy*, 768 F.2d at 1451. The discriminatory character of the must-carry rules, as well as their invasion of operators' "editorial discretion," left the court with "serious doubts about the propriety of applying the standard of review reserved for incidental burdens on speech" (*id.* at 1453).

But the court ultimately found no need to decide whether strict scrutiny should apply, since it found the must-carry rules "clearly impermissible" even under the *O'Brien* test (768 F.2d at 1454). The "substantial governmental interest" urged by the FCC in support of the rules was "the interest of preserving free, locally-oriented television." The court assumed without deciding that this interest, "taken as an abstract proposition," was "sufficiently weighty to warrant the rules' interference with First Amendment rights." *Ibid.* But the court held that the government "must do something more than merely posit the existence of the disease sought to be cured." Rather, it was required to produce evidence that " 'convincingly shows a problem to exist,' " *i.e.*, "that without the protection afforded by the must-carry rules the economic health of local broadcast television is threatened by cable." *Id.* at 1455, quoting *Home Box Office*, 567 F.2d at 50.

The court concluded that the FCC had failed to carry "its heavy burden of justification" in this respect (768 F.2d at 1457). The FCC itself in its *Economic Inquiry Report* had found that " 'competition from cable television does not pose a significant threat to conventional television or to [the FCC's] overall broadcasting policies.' " *Id.* at 1456 (quoting 71 FCC 2d at 661). "[T]he approximate doubling of the

number of broadcast stations across the country since 1965" also provided circumstantial evidence of broadcast industry health (768 F.2d at 1461 n.53). And the FCC acknowledged the availability of an "inexpensive switch"—generally called an input-selector or "A/B switch"—that "would enable a viewer to alternate between cable and off-the-air VHF signals" (*id.* at 1441). The court thus observed that, "in principle, a cable subscriber with little or no effort could still view local broadcasts even without the benefit of the must-carry rules," in which case "the Commission's reasoning would be deprived of its major premise" (*ibid.*).

When first promulgating must-carry rules in 1965, the FCC had cited impediments to successful use of A/B switches, such as consumer inconvenience and the necessity of maintaining indoor or outdoor antennas. *See* 768 F.2d at 1441 (citations omitted). But "[i]n the two decades since the rules' original promulgation," the FCC had never reexamined what the court described as "the admittedly speculative links in [its] chain of reasoning" (*id.* at 1457). The court accordingly held that the FCC could demonstrate a "substantial governmental interest" only by providing support for the two assumptions that were "the linchpins of its analysis" (*ibid.*):

> (1) that without protective regulations cable subscribers would cease to view locally available over-the-air television either because they would disconnect their antennas or because the inconvenience of a switching device would deter them; and (2) that even if some cable subscribers did abandon local television, they would do so in sufficient numbers to affect the economic vitality of local broadcasting.

Lastly, the court held that the must-carry rules as then drafted would be invalid even if the FCC had demonstrated the substantiality of its interest, since the rules were not "narrowly tailored to the evil sought to be corrected" (768 F.2d at 1459). The FCC's asserted interest, the court observed, was "to protect local broadcast*ing* and not local broadcast*ers*" (*id.* at 1460 (emphasis original)). "But if the goal is to preserve 'localism' and not 'local broadcasters,' "

the must-carry rules were "grossly overinclusive" because they "indiscriminately protect[ed] each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator" (*ibid.*). To show that its rules were "narrowly tailored" for *O'Brien* purposes, the court held that the Commission must establish a "baseline" for ascertaining whether regulatory intervention is actually necessary to preserve free community-oriented television. Such a "baseline" of localism could be "measured by the number of local broadcast stations in the community, the amount of local programming, or any other criterion within [the FCC's] discretion to choose." 768 F.2d at 1461.[2]

3. *The FCC's Response to Quincy.* The FCC suspended the must-carry rules and, after some pressure from Congress, announced its intent to reconsider the signal carriage question. 50 Fed. Reg. 48232 (1985). Following receipt of public comments, it adopted a "two-part regulatory program that eventually will eliminate the need for cable television mandatory signal carriage regulation." *Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 1 FCC Rcd. 864, ¶ 1 (1986) ("1986 Report"). The first part of this program "require[d] cable systems to offer subscribers input selector switches for use with antennas and to conduct a consumer education program concerning the purpose of, and need for, maintaining off-the-air reception capability" (¶ 1). The second part consisted of an interim set of must-carry rules, to expire at the end of a five-year transition period, which were designed "to provide an orderly transition to a new environment" (*ibid.*).

In its report, the Commission substantially revised its 1965 assessment of the threat posed by cable to local television. It noted that "many cable systems are now pro-

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[2] The National Association of Broadcasters (NAB) sought certiorari from the *Quincy* decision, which was denied. 476 U.S. 1169 (1986). The Solicitor General did not seek certiorari.

viding locally originated programming" (¶ 114), whereas some broadcasters covered by the former must-carry rules offered little programming of genuine local interest (¶ 34). An FTC staff study indicated that, "absent must-carry rules, cable systems can be expected to carry many or most local broadcast stations" (¶ 54), since those stations were very popular with subscribers (¶ 52). Most cable systems in fact "continued to carry those stations that are available in their communities in the period since the *Quincy* decision" (¶ 131). Although there were some instances where cable systems had chosen to drop or decline carriage to certain broadcasters (and to certain cable programmers), the FCC found no evidence that these decisions betrayed anticompetitive animus (¶ 128). Rather, it found that isolated refusals to carry "do[ ] not necessarily indicate a public harm, but may simply reflect the fact that there is not sufficient demand for the station by the system's subscribers to warrant carriage" (*ibid.*).

The FCC concluded that use of A/B switches, coupled with antennas, offered the best long-term method of ensuring viewers' access to those few local broadcasters that cable systems did not voluntarily carry. It found that an A/B switch is a "low-cost item" whose "installation costs will be minimal" (¶ 215). It also noted the "relatively low cost and simple installation of indoor antennas," available both in set-top and attic designs; such antennas permit consumers "to receive signals of acceptable quality" even in locations where outdoor antennas are too costly or prohibited (¶ 166). Although the NAB alleged minor technical problems with A/B switches, the Commission found its concerns "overstated" and concluded that such problems could easily be handled by equipment redesigns pursuant to FCC-mandated standards (¶¶ 142, 165).

While judging A/B switches the best long-term solution, the Commission found that "most cable subscribers now are unaware of the need to receive broadcast signals off-the-air and are unprepared to do so" (¶ 135). A 1986 study commissioned by NAB showed that many cable subscribers disconnected their antennas and rarely used A/B switches—

behavior the FCC found to be "a direct result of the former must carry rules" (¶¶ 46, 122-125, 121). Because those rules "required cable systems to carry all available off-the-air broadcast television signals," cable subscribers previously "had no reason to be familiar with an input selector device for choosing between cable and off-the-air" reception (¶¶ 121, 122).

The FCC concluded, in short, that its former must-carry rules had created a "misperception" on the part of consumers that "broadcast signals will always be available as part of their basic cable service" (¶¶ 121, 122). To correct this misapprehension, the FCC required cable systems to provide their customers with "input selector switches that will enable reception of broadcast signals by means of antenna," thereby "leaving the subscriber in the same position to receive off-the-air signals as before cable installation" (¶¶ 136, 140). Cable systems were also required to "implement a consumer education program to inform their subscribers of the purpose, and need for, maintaining off-the-air reception capability" (¶ 136). The Commission noted that consumers had already "become familiar with switching between alternative program sources through the use of VCRs," and it concluded that they "will accept cable/broadcast input switching as simply another program source option" (¶ 164).

To provide an "orderly transition" during the period of consumer acclimatization, the FCC promulgated interim must-carry rules, to remain in effect for a five-year period (¶ 1). Unlike the prior rules, the interim rules generally required a cable system to devote no more than 25% of its channel capacity to must-carry stations (¶ 151). Only full-power stations qualified for mandatory carriage (¶ 144), and all commercial stations had to meet a "minimum viewership" standard in order to qualify (¶ 145). A cable system was free to carry qualified stations "on any channel or frequency," so long as carriage was provided on the basic tier (¶ 155). The FCC found "no need or justification • • • for imposing must carry requirements for more than a five year

period," concluding that "must carry regulations are neither desirable nor sustainable as long-term solutions to the problem of cable subscribers' access to broadcast signals" (¶ 138).[3]

4. *The Century Decision.* Upon petitions for review, the D.C. Circuit again declared the Commission's must-carry rules unconstitutional. *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988). In an opinion written by Judge Wald and joined by Judges Mikva and McGowan, the court once more saw no need to decide "[t]he precise level of First Amendment protection" enjoyed by the cable industry (835 F.2d at 298). The FCC urged that *O'Brien* supplied "the correct test," and its arguments left the court "unconvinced that the new must-carry rules are necessary to advance any substantial governmental interest, so as to justify an incidental infringement of speech" (*id.* at 298, 293).

In assessing the "substantial interest" prong of *O'Brien*, Judge Wald observed that the FCC had abandoned any contention that must-carry rules "were needed for the indefinite future to ensure viewer access to local broadcast stations" (835 F.2d at 296). Rather, the government made the more modest contention that such rules were necessary

[3] In response to petitions for reconsideration filed by broadcast and cable interests, the FCC adhered to its basic two-part regulatory program. *See* 2 FCC Rcd. 3593 (1987). The Commission exhaustively considered various objections to the workability of the A/B switch proposal (¶¶ 50-56), concluding that "the information currently before us with respect to switch costs, technical performance, consumer convenience, switch compatibility with other equipment, and use of antennas for off-the-air reception is more than sufficient to support" the practicality of A/B switches (¶ 54). However, the Commission agreed to conduct a separate rulemaking "limited to issues associated with technical standards for cable/broadcast input selector switches" (¶ 94). The FCC also modified its proposed switch-installation and consumer education rules to make them less burdensome for cable operators (¶¶ 81-84, 95-101). The FCC's current technical standards for A/B switches are codified at 47 CFR §§ 15.115 and 15.117; the consumer education rules appear at 47 CFR § 76.66.

only for "a shorter-term transition period during which viewers could become accustomed" to the switch-and-antenna technology (*ibid.*). For two distinct reasons, the court determined that the government had not carried even this more limited burden of proof.

First, the court discerned no support for the FCC's assumption that "in the absence of must-carry rules, cable companies would drop local broadcasts" during the five-year transition period (835 F.2d at 303). The court found that "[e]xperience belies that assertion," noting the FCC's findings that "cable companies generally did not drop local broadcast signals that they had been carrying prior to *Quincy*" (835 F.2d at 303). Moreover, both the FTC and the Justice Department had "concluded, in separate reports, that the absence of must-carry would not harm local broadcasting" (*ibid.*).

Second, even if the FCC had demonstrated cable systems' propensity to drop broadcasters, the court found no support for a transition period "to keep local broadcasts accessible to viewers while the new switch-and-antenna technology takes hold" (835 F.2d at 300). The "lone item of 'hard' record evidence on which the FCC relie[d]" was a 1986 study commissioned by NAB (*id.* at 300-301). The court found various flaws in the study (*id.* at 301-302) and questioned the FCC's wisdom in placing sole reliance on data supplied by an interested party. As the court observed, "NAB's members have long benefited from the existence of must-carry rules," and its rulemaking comments "strongly criticized alternative proposed regulations that it perceived as inadequately protective of broadcasters, such as reliance on the A/B switch" (*id.* at 301).

Even if the NAB study were taken at face value, the court found that it "provide[d] only the spongiest of foundations" for the interim must-carry rules (835 F.2d at 302). The gist of the study's findings was that most cable subscribers either lacked A/B switches or disconnected their antennas, so that "only about 10% of cable subscribers presently switch back and forth between cable and antennas"

(*id.* at 301). But the court concluded that this pattern of consumer behavior "can most reasonably be accounted for by the fact that, in a must-carry world, the need to [switch] is slight" (*ibid.*). "Common sense suggests," the court noted, "that consumers who want to receive an off-the-air channel will quickly observe that they may need to purchase (or reconnect) antennas should their cable system cease offering their favorite broadcast stations" (*ibid.*).

The court also considered whether the "indelibility of consumer ignorance" postulated by the government was "so obvious or common sensical that it needs no empirical support." The court concluded that it was not (835 F.2d at 302):

> In a culture in which even costly items like the videocassette recorder, the cordless telephone, the compact disc-player and the home computer have spread like wildfire, it begs incredulity to simply assume that consumers are so unresponsive that within the span of five years they would not manage to purchase an inexpensive hardware-store switch upon learning that it could provide access to a considerable storehouse of new television stations and shows.

Finally, even if the FCC had demonstrated more than a "fanciful threat" to local broadcasting, the court held that the must-carry rules' "lengthy duration" would cause them to fail the second prong of the *O'Brien* test (835 F.2d at 303-304). "It is wholly unclear to us," the court stated, "why it should take five years to inform consumers that with the installation of a $7.50 switch and a television antenna they can view more local channels" (*id.* at 304). The court also expressed skepticism that "any consumer education campaign will have much impact so long as viewers can continue to rely on must-carry to get their fix of local broadcasts" (*ibid.*). "Opting for a five-year interim period," in the court's view, "merely delays the inevitable, but almost certainly brief, period during which TV owners will learn of, purchase,

and install the necessary equipment" (*ibid.*, footnote omitted).[4]

C. The 1992 Cable Act

Since *Century*, the FCC has considered and resisted broadcast industry appeals for new must-carry rules. *See Must Carry Second Notice of Proposed Rulemaking*, 6 FCC Rcd. 4545, ¶ 111 (1991) (requesting comments on "whether, in today's video marketplace, must carry rules are needed"). But the FCC's deliberations were overtaken by legislative developments. Spurred largely by concern over increases in basic cable rates, Congress in 1992 enacted legislation reinstituting comprehensive cable rate regulation. Cable Television Consumer Protection and Competition Act of 1992 ("the Act"), Pub. L. No. 102-385, 106 Stat. 1500. In this climate, the broadcast industry had little difficulty persuading Congress, notwithstanding the FCC's prior findings, to include in the law a new generation of must-carry rules.

Section 2(a) of the Act sets forth legislative "findings" designed to cure the flaws discerned by the D.C. Circuit in the government's prior justifications for must-carry. These include statements that, without must-carry protection, "the economic viability of free local broadcast television * * * will be seriously jeopardized" (§ 2(a)(16)), and that "alternative distribution systems for cable subscribers, such as the 'A/B' input selector antenna system, [are] not in the public interest" (§ 2(a)(18)).

The must-carry provisions, set forth in sections 4 and 5 of the Act, discriminate in favor of broadcasters, and against cable programmers, in three distinct ways. First, the Act grants preferential carriage rights to broadcasters at cable programmers' expense (§§ 4(b) & 5(b)). Second, the Act ensures broadcasters carriage on the system's basic tier, which must be received by all subscribers (Act §§ 4(b)(7) & 5(h);

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[4] The court later clarified its opinion, stating that it had invalidated only the interim must-carry rules, and not the separate requirements concerning input-selector switches and consumer education. 837 F.2d 517 (D.C. Cir. 1988). The NAB sought certiorari, which was denied. 486 U.S. 1032 (1988). The Solicitor General did not seek certiorari.

see id. § 3(b)(7)(A)). This guarantees broadcasters access to the largest possible audience. Third, the Act grants broadcasters preferential "channel positioning" rights, enabling a broadcaster to demand cable carriage on its current broadcast channel or "on the channel on which it was carried on July 19, 1985," the date of the *Quincy* decision (Act §§ 4(b)(6) & 5(g)(5)).[5] Many cable programmers were not in existence in July 1985, and the Act thus entitles broadcasters to bump them from lower (and hence more favorable) channel positions. *See* J.A. 153-154. Moreover, consumer confusion occasioned by channel repositioning can cause cable programmers to lose viewership.

Section 6 of the Act, governing "retransmission consent," is an interrelated component of the regulatory scheme. This provision, which became effective October 6, 1993, prohibits cable systems from retransmitting the signal of any commercial broadcaster without obtaining that station's consent. The Act thus gives each broadcaster an option: it may request mandatory (but uncompensated) carriage under § 4; or it may waive its must-carry rights and demand payment for carriage under § 6.

In a variety of respects, the Act's must-carry provisions are more intrusive of cable speakers' First Amendment rights than the FCC rules invalidated in *Century*:

> (1) Under the 1986 FCC rules, larger cable systems were required to devote no more than 25% of their channels to must-carry obligations. The 1992 Act raises this percentage to about 40%—33% for commercial stations under § 4(b), and additional channels for noncommercial stations under § 5(b).
>
> (2) Under the 1986 FCC rules, cable systems with fewer than 21 channels had no obligation to carry any commercial stations. The Act imposes the full panoply of commercial carriage obligations on virtually all cable systems, except those with fewer than 300 subscribers (§ 4(b)).

[5] A commercial station has a third channel-position option: "the channel on which it was carried on January 1, 1992" (Act § 4(b)(6)).

> (3) Under the 1986 FCC rules, no cable system was required to carry more than two noncommercial stations. The Act requires larger systems to carry all noncommercial stations carried as of March 1990, plus any other nonduplicating stations that request carriage (§ 5(b) & (c)).
>
> (4) Under the 1986 FCC rules, cable systems had no obligation to carry any low-power stations. The Act requires larger systems to carry up to two low-power commercial stations if there are not enough full-power commercial stations to fill the 33% quota (§ 4(c)).
>
> (5) Under the 1986 FCC rules, cable systems had the discretion to determine the channel position of all broadcasters subject to mandatory carriage. The Act confers on both commercial and noncommercial broadcasters unilateral channel-positioning rights.
>
> (6) The 1986 FCC rules required commercial stations to meet a "minimum viewing standard" in order to qualify for mandatory carriage. The Act has no such provision; all commercial stations must be carried regardless of programming quality or viewer preferences.
>
> (7) Under the 1986 FCC rules, a broadcaster had to be situated within 50 miles of the cable community to qualify for mandatory carriage as a "local" broadcaster. By defining "local" with reference to "television market," the Act enlarges this geographic area and expands the pool of broadcasters who may demand carriage on a cable system (§ 4(h)(1)).
>
> (8) The 1986 FCC rules were to expire after a five-year transition period. The Act's must-carry regime is to remain in effect indefinitely.

D. The Decision Below

Appellants' First Amendment challenges to the Act's must-carry regime were heard by a three-judge district court

(J.S. App. 3a, 7a),[6] which sustained the provisions by a 2-1 vote. The majority first held that strict scrutiny does not apply (J.S. App. 12a-19a). It concluded that the must-carry provisions do not regulate "speech," but "a market in a commercial commodity," namely, "the means of delivery of video signals to individual receivers" (*id.* at 12a). The fact that "the video signals can only be used to convey a message," according to the majority, "is of no particular significance" (*id.* at 12a-13a). The court acknowledged that the Act discriminates against cable programmers in favor of broadcasters; but it held that " '[s]peaker-partial' regulations * * * are not subject to strict scrutiny unless they are content-based" (*id.* at 17a).

The court concluded that a law is "content-based" only if government has prescribed "either the message or the subject matter" of the speech to be spoken, *i.e.*, has "t[old] the speaker *what* to say or at least what to talk about" (J.S. App. 16a-17a (emphasis original)). The majority seemed to acknowledge that Congress' rationale for must-carry implied some preference for the content of "local" broadcasting; but it concluded that "if the must-carry provisions are content-related at all, they are only marginally so, to the point of *de minimis*" (*id.* at 20a). In any event, the majority held that "contextual factors unique to cable require relaxed First Amendment scrutiny of the must-carry provisions even if marginally content-related" (*id.* at 22a n.25).

The majority next held that the must-carry provisions "satisfy the criteria established in *O'Brien* and its progeny" (J.S. App. 15a), which it thought supplied the appropriate standard of review. As to the substantiality of the governmental interest, the court refused to evaluate independently

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[6] The three-judge court declined jurisdiction over appellants' challenges to other provisions of the Act (J.S. App. 7a). Those other challenges were heard by a single-judge court which, by opinion dated Sept. 16, 1993, and final judgment dated Sept. 27, 1993, upheld certain provisions and invalidated others. *Daniels Cablevision, Inc., et al. v. United States*, Nos. 92-2292, 92-2494 & 92-2558 (D.D.C. 1993).

"the factual premise on which the must-carry provisions are based, *viz.*, that local broadcasting is in peril" (*id.* at 24a). "Federal courts," it stated, "do not ordinarily review the adequacy of the record before Congress to support the laws it enacts" (*id.* at 15a). Here, "Congress received evidence demonstrating, to its satisfaction," that "local broadcast television * * * is in serious jeopardy" (*id.* at 24a-25a). Deference to legislative findings thus induced the court to conclude "that the danger perceived by Congress is real and substantial" (*id.* at 26a).

Finally, the court held that the must-carry provisions "are sufficiently, if not surgically, tailored to Congress' larger economic market-adjusting objective" (J.S. App. 26a). It acknowledged that "there are less restrictive alternatives that Congress could have employed in its attempt to preserve the vitality of local broadcasting" (*ibid.*). Once again, however, it was "unwilling to second-guess Congress' determination that the must-carry provisions are necessary to accomplish its objective" (*id.* at 27a).

Circuit Judge Williams dissented. He concluded that strict scrutiny applies because the must-carry rules invade cable operators' "editorial discretion" and are "content-based under controlling precedent" (J.S. App. 54a, 55a). He noted that Congress "rested its decision to promote [broadcast] stations in part, but quite explicitly, on a finding about their content—that they were 'an important source of local news and public affairs programming' " (*id.* at 51a (quoting Act § 2(a)(11)). Under FCC licensing requirements, Congress' class of chosen beneficiaries was "a class whose programming must, as a matter of law, include content of a type specified by the government" (J.S. App. 57a). Application of the *O'Brien* test "for 'incidental' burdens on speech," Judge Williams said, "seems highly artificial here" (*id.* at 54a-55a):

> Given the finite number of cable channels, replacement of the cablecaster's choice of programs with those of local broadcasters suppresses the alternative programs as completely as if Congress had ordered them shut down; there is nothing 'incidental' about the burden.

In assessing the government's interest, Judge Williams found "no evidence" that the public's access to free local television is in jeopardy (J.S. App. 62a). Despite the absence of must-carry rules during the past eight years, broadcast television has grown substantially, with new entrepreneurs both "deepening and spreading the coverage of over-the-air TV" (*ibid.*). Although there was "evidence of some cable operators' dropping broadcast channels," Judge Williams noted that such drops were extremely infrequent: cable systems voluntarily carried about 95% of the broadcast signals available to them. *See id.* at 63a-64a. Moreover, because the data before Congress did not reveal "the characteristics of the broadcasters actually dropped"—such as their relative popularity—Judge Williams concluded that "we have *nothing* to connect the limited evidence of cable operators' actual conduct with any inference that a threat to broadcast is imminent or serious" (*id.* at 64a-65a).

Finally, "even if local broadcasters were in perceptible peril," Judge Williams stated that "less intrusive alternatives are obvious" (J.S. App. 66a). To the extent Congress views cable systems as posing a "bottleneck" problem, he cited "well-developed regulatory responses to this sort of situation" that are "entirely consistent with the First Amendment" (*id.* at 50a). Under an equal-access model, for example, "[t]he 'bottleneck' holder [might] be ordered to serve all parties that meet neutral criteria for service" (*ibid.*) In short, even conceding the need for *some* regulation of cable systems, Judge Williams saw no justification for adopting a regime that discriminates against "one set of speakers for the direct and explicit advantage of a limited class of their competitors" (*id.* at 57a).

INTRODUCTION AND SUMMARY OF ARGUMENT

On two prior occasions, the D.C. Circuit has evaluated earlier incarnations of the must-carry regime and held, in each case unanimously, that this scheme of speaker-partial

regulation violates the First Amendment. The governmental interests asserted in support of the 1992 Act's must-carry provisions are the same ones that the D.C. Circuit twice found to be of questionable weight and evidentiary support. And while the 1992 regime is similar in rough outline to its predecessors, it is indisputably *more intrusive* on appellants' First Amendment rights than the must-carry scheme invalidated in *Century*.

In urging a different result here, appellees rely in essence on a single fact: the 1992 must-carry regime is embodied in an Act of Congress, which includes "findings" purporting to cure the various defects that the D.C. Circuit previously discerned in findings compiled by the FCC. But as we shall show, the actual evidence before Congress—as distinguished from the jeremiads of the broadcast industry, upon which the Act's conclusory findings are based—reveals that the system of local broadcasting has thrived during the past eight years in the absence of must-carry rules. Thus, not only is the 1992 must-carry regime more oppressive than its predecessor; the proof of its necessity is far more attenuated.

At bottom, appellees' argument is reduced to a plea for deference. It is their submission, in effect, that the deference owed to legislative findings is of a transcendentally higher order than the deference owed findings of an expert administrative agency, such that the outcome here should be different than it was in *Quincy* and *Century*. This submission—dubious at best were the Court interpreting a statute—should be rejected out of hand when it is adjudicating the requirements of the Constitution.

Whether the Court applies traditional, exacting First Amendment scrutiny, or some less rigorous standard of review along the lines of *O'Brien*, the must-carry scheme embodied in the 1992 Act should be invalidated. The governmental interests asserted in its support are so speculative, and the scope of its restrictions so overbroad in view of those purported goals, that the law must fall under any applicable standard of review.

ARGUMENT

I. THE MUST-CARRY PROVISIONS ARE SUBJECT TO EXACTING FIRST AMENDMENT SCRUTINY

This Court has not yet comprehensively addressed the implications of government actions infringing cable speakers' First Amendment rights. *See Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986). Addressing must-carry rules in particular, the D.C. Circuit in *Quincy* and *Century* found no need to decide the appropriate standard of review, while expressing "serious doubts about the propriety of applying the standard of review reserved for incidental burdens on speech" (*Quincy*, 768 F.2d at 1453).

The *Quincy* court's doubts were judicious. The burdens that the must-carry law inflicts on cable programmers' speech are by no means "incidental." By reserving up to 40% of cable systems' channel capacity for commercial and noncommercial broadcasters, the statute will inevitably cause many cable programmers to be dropped from cable systems in order to make room for Congress' preferred speakers. New or fledgling cable programmers, which currently enjoy carriage on few or no cable systems, will find it difficult or impossible to obtain carriage given the reduced number of channels for which they may compete. By diminishing or obliterating the audience reachable by cable programmers—who, unlike broadcasters, have no alternative means of communicating their messages to the public—the must-carry law burdens their speech not incidentally, but directly. As a discriminatory and content-based restriction on speech, the statute deserves strict scrutiny.

In urging more lenient review, the government defends the must-carry regime as economic legislation aimed to redress "bottleneck" problems arising from cable systems' "natural monopoly characteristics" (Mot. to Aff. 13, 20). This argument is unpersuasive as applied to cable operators. But it is wholly inapposite as applied to cable *programmers*. Programmers engage in pure speech: they have none of the

public-utility or "common carrier" attributes that appellees impute to cable systems as justification for regulatory intervention (NAB Mot. to Aff. 25, 30 & n.28).

For First Amendment purposes, cable programmers are indistinguishable from authors of books and makers of movies. If a "bottleneck" problem exists in the cable distribution system, cable programmers, no less than broadcasters, may be the victims. Thus, whatever standard of review might apply if Congress had legislated a level playing field for all suppliers of video programming, the discriminatory regime it actually enacted dictates the necessity of strict scrutiny.

A. The Must-Carry Restrictions Are Content-Based

1. This Court has repeatedly held that content-based laws trigger exacting First Amendment review. *E.g.*, *Texas v. Johnson*, 491 U.S. 397, 412 (1989). As the district court recognized, "a law need not be viewpoint-based to be • • • considered content-based" (J.S. App. 16a). Strict scrutiny applies to viewpoint-neutral laws that burden discussion of a particular topic, such as "crime." *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 112 S.Ct. 501 (1991). And a law is deemed content-based, even if neutral as to the ideas expressed, if it discriminates among different "categories" or "types of speech." *Burson v. Freeman*, 112 S.Ct. 1846, 1850, 1855 (1992) (statute discriminating against political campaign speech); *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505 (1993) (newsrack ordinance discriminating against commercial publications).[7]

The Court has also applied strict scrutiny to laws that discriminate against particular groups of speakers, irrespective of their viewpoints or the subjects they plan to discuss. For example, in *Riley v. National Fed. of the Blind*, 487 U.S. 781, 794 (1988), the Court invalidated a state law that placed percentage limitations on charitable fundraising expenses, thereby imposing "a restriction on the charities' ability to speak." Given the vast number of this Nation's

[7] There is no relationship between Discovery Communications, Inc., appellant here, and the respondent in *Discovery Network*.

charities and their virtually limitless range of interests, there was no contention in *Riley* that the law inhibited the discussion of any particular topic. The Court nevertheless applied strict scrutiny because the law burdened the speech of particular speakers, especially charities that were smaller or less-established (*id.* at 789 & n.5):

> Far from the completely incidental impact of, for example, a minimum wage law, a statute regulating how a speaker may speak directly affects that speech. • • • Here, the desired and intended effect of the statute is to encourage some forms of solicitation and discourage others.

Similarly, in *Buckley v. Valeo*, 424 U.S. 1, 39-51 (1976), the Court invalidated a federal statute that imposed a $1,000 limitation on independent expenditures by any person "relative to a clearly identified candidate" in a political campaign. This limitation was "neutral as to the ideas expressed" (*id.* at 39) and was designed to equalize voters' electoral participation by "restricting the voices of people and interest groups who have money to spend" (*id.* at 17). The Court distinguished the law from "reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas" (*id.* at 18). And the Court was unpersuaded by Congress' objective of "equalizing the relative ability of individuals and groups to influence the outcome of elections" (*id.* at 48). "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others," the Court stated, "is wholly foreign to the First Amendment." *Id.* at 48-49; *see Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 176 (1976) (public board may not "discriminate between speakers at its meetings").[8]

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[8] In an effort to reconcile *Buckley* with its assertion that "[s]peaker-partiality alone • • • is insufficient to trigger strict scrutiny," the district court characterized that case as one "in which the government sought, in effect, to suppress the expression of a meretricious idea" (J.S. App. 18a). According to the majority below, this Court in *Buckley* found "[i]mplicit" in the legislative scheme "a Congressional judgment that the speech of those spending over $1,000 was not only 'louder' than those spending less than $1,000, but was also different and • • • more sinister." J.S. App. 18a (citing 424 U.S. at 16-17). This characterization is baseless: the *Buckley* Court treated the expenditure limitations as "neutral as to the ideas expressed" and invalidated them because (among other things) they imposed "direct and substantial restraints on the quantity of political speech" (424 U.S. at 39). In the pages cited by the district court (*id.* at 16-17), this Court explained why the expenditure limitations were not "comparable to the restrictions on conduct upheld in *O'Brien*," but instead constituted pure restrictions on speech. This passage contains not the slightest suggestion that the Court regarded the law as designed to suppress "sinister" ideas or, indeed, speech of any particular sort.

2. Judge Williams correctly concluded that the must-carry provisions are "content-based under controlling precedent" (J.S. App. 55a). First, these provisions are explicitly designed to "favor certain classes of speakers over others." *Home Box Office*, 567 F.2d at 48. "Their very purpose is to bolster the fortunes of local broadcasters even if the inevitable consequence • • • is to create an overwhelming competitive advantage over cable programmers." *Quincy*, 768 F.2d at 1451. As a direct result of the must-carry law, cable programmers like Discovery and TLC will be forced off some cable systems and precluded from securing new carriage on others, even though viewers would rather see their programming than the broadcast programming Congress has preferred.

The must-carry regime is no different from a law that orders newsstands to carry a quota of "local" newspapers; that forces bookstores to allocate half their shelf space to books by "local" authors; or that requires movie theatres to devote half their showtimes to made-for-TV movies. In each case, the government puts itself in the business of selecting which "programming" the public will see. And each law is intentionally discriminatory: by conferring preferential access on one group of speakers, the government makes it concomitantly more difficult—and in some cases impossible—for competing speakers to secure an audience.[9]

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[9] Appellee NAB errs (Mot. to Aff. 20) in relying on this Court's statement in *Leathers v. Medlock*, 111 S.Ct. 1438, 1443 (1991), that

This discriminatory regime, moreover, is expressly rationalized by reference to the superior value Congress placed on the programming it thought local broadcasters would offer. The Act's findings state that Congress aimed to promote "the local origination of programming" (§ 2(a)(10)); "programming that is responsive to the needs and interests of the local community" (§ 2(a)(8)(B)); and "local news and public affairs programming and other local broadcast services critical to an informed electorate" (§ 2(a)(11)). In justifying the preference embodied in § 5 of the Act, Congress specifically cited the "unique noncommercial" nature of public stations' programming—the very sort of discrimination in favor of noncommercial speech that was involved in *Discovery Network*, 113 S.Ct. at 1516-1517. Congress explicitly preferred local broadcasters' speech, in short, because of a belief that it is "especially worthy" (J.S. App. 53a (Williams, J., dissenting)). That is a content-based judgment, no less than Cincinnati's judgment that "commercial speech has only a low value." *Discovery Network*, 113 S.Ct. at 1511.

Even more important, the speakers that the must-carry law prefers—local broadcasters—are precisely those over

"differential taxation of First Amendment speakers is constitutionally suspect [only] when it threatens to suppress the expression of particular ideas." That case involved a generally applicable gross receipts tax that granted an exemption to newspapers, magazines, and certain satellite services, but not to cable television systems (*id.* at 1444). The Court sustained this tax scheme, noting that "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes," and that "a legislature is not required to subsidize First Amendment rights through a tax exemption or tax deduction." *Id.* at 1445-1446 (citing *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), and *Cammarano v. United States*, 358 U.S. 498 (1959)). The outcome in *Leathers* thus reflects a distinction long established in this Court's First Amendment tax cases—the distinction between a legislature's imposition of a tax targeted specifically at members of the press, and a legislature's decision not to grant particular speakers an *exemption* from a tax that businesses generally must pay. *Compare Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). The instant case does not involve a tax law, nor does it involve the grant of an exemption from a generally applicable burden.

whose content the government exercises maximum control. Under the "spectrum scarcity" rationale, Congress has conditioned the award of free broadcast licenses on broadcasters' compliance with a variety of government dictates. Of special relevance here, FCC licensing rules require each broadcaster to "provide programming responsive to issues of concern to its community." *Report and Order, MM Docket No. 83-670*, 98 FCC 2d 1075, 1091-1092 (1984). The beneficiaries of the must-carry law are thus "persons *bound* to include some minimum level of local programming content" (J.S. App. 55a (Williams, J., dissenting) (emphasis original)).

Wholly apart from the obligation to further "localism," broadcasters are subject to numerous *substantive* requirements regarding program content. These include provisions concerning children's programming (47 U.S.C. § 303b); limitations on the broadcast of so-called "indecent programming" (Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949, § 16(a)); required access to broadcast facilities by candidates for federal elective office (47 U.S.C. § 312(a)(7), 47 CFR § 73.1944); and the general obligation "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (47 U.S.C. § 315(a)). Unlike cable programmers, broadcast licensees are also subject to restrictions regarding "political editorials" (47 CFR § 73.1930) and personal attacks made "during the presentation of views on a controversial issue" (47 CFR § 73.1920(a)). In short, "by virtue of provisions of law outside the 1992 Act, the term used by the Act to define the benefitted class *automatically* entails content requirements." J.S. App. 52a (Williams, J., dissenting).

The must-carry provisions thus embody a preference for *regulated* speech, in effect exporting to cable systems the broadcast regulatory regime that Congress, in the absence of "spectrum scarcity," could not impose on cable speakers directly. The district court itself acknowledged the likelihood of a congressional assumption "that there would be some content differences between the subject matter" supplied by local broadcasters and cable programmers (J.S. App. 20a).

But whereas the court believed that this assumption arose "on a very non-specific (and unarticulated) level" (*ibid.*), the actual legislative evidence shows that the assumption was neither unspoken nor vague.

Congress described local broadcasters as "public trustee[s]" who are "accountable to the public interest" and have "statutory obligations to serve their communities." S. Rep. 102-92, 102d Cong., 1st Sess. 42, 40, 44 (1991). It specifically justified must-carry on the ground that "cable systems are not subject to the wide range of public service obligations imposed on local broadcast stations." *Id.* at 59; H.R. Rep. 102-628, 102d Cong., 2d Sess. 64 (1992). It quoted with approval the observation that "cable, * * * unlike broadcasting, [has] little or no program accountability to any public or government authority." S. Rep. 102-92, at 40. And the Act itself, in defining "qualified low power stations" entitled to must-carry protection (§ 4(h)(2)(B)), provides that a qualifying station must satisfy

> all obligations and requirements applicable to television broadcast stations * * * with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity.

Congress also cited the types of programming it believed local broadcasters would offer. It found must-carry protection justified for noncommercial stations because they "provide a variety of special services to their communities, including local news and public affairs programs, programs offering outlets for local cultural and artistic groups, and coverage of local and state government activities and personalities." H.R. Rep. 102-628, at 69. It expressed concern about the "quality and quantity of sports programming available on free television" (*id.* at 125), and made a station's "local" status depend in part on whether it provides "coverage of sporting and other events of interest to the community" (Act § 4(h)(1)(C)(ii)(III)). Broadcast industry

witnesses urged that broadcasters deserved must-carry protection because "television stations have statutory and regulatory obligations to their local communities," including the obligation to "provide access and equal opportunities for federal candidates and equal opportunities for local candidates." *Hearing Before the Subcomm. on Communications of the Senate Commerce Comm.*, 101st Cong., 1st Sess. 38 (Oct. 25, 1989). And Chairman Hollings praised local broadcasters' role in informing voters about "candidates' positions on issues in local elections." *Id.* at 4.

In sum, the legislative evidence shows that Congress' preference for local broadcasters was directly linked to its perceptions about the content of their programming. Congress deemed broadcast speech "especially worthy" (J.S. App. 53a) not only because it was thought to cover topics and events "local" in nature, but also because its regulated character ensured compliance with norms that Congress has otherwise established. These content-related features demand strict scrutiny.

3. While conceding that "the must-carry provisions * * * alter the content of programming" (Mot. to Aff. 23), the government contends that they "are not content-related for First Amendment purposes" under the standards of *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Appellee NAB similarly cites *Ward* for the proposition that "[g]overnment regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.' " Mot. to Aff. 9 (citing *Ward*, 491 U.S. at 791, and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)).

Appellees' reliance on *Ward* and *Renton* is misplaced for two reasons. First, as shown above, Congress justified the must-carry law in part by reference to the content—both the local focus and the regulated character—of local broadcasters' speech. The possible existence of other, content-neutral justifications does not change this fact. Because the must-carry regime thus is not "justified without reference

to * * * content," the analysis set forth in *Ward* and *Renton*, if applicable here, would not permit these provisions to escape strict scrutiny.

More fundamentally, the aspect of *Renton* and *Ward* on which appellees rely has no application where, as here, the challenged law unabashedly alters the content of speech itself. This Court has used the "justified without reference" formula in cases involving "time, place or manner" restrictions on expressive conduct. As the Court stated in *Ward*, "Our cases make clear * * * that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are 'justified without reference to the content of the regulated speech * * *.'" 491 U.S. at 791, quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). *Ward* itself involved a "time, place, or manner" restriction—a regulation of sound-amplification at outdoor public concerts. *Renton* concerned a zoning ordinance affecting the location of adult movie theatres—a restriction that the Court said was "properly analyzed as a form of time, place, or manner regulation" (475 U.S. at 48, 46). And each of the three cases cited in *Renton* and *Ward* as sources for the "justified without reference" analysis concerned time, place, or manner restrictions.[10]

Where a speech restriction is defended on "time, place or manner" grounds, it is necessary to ascertain whether

[10] *See Renton*, 475 U.S. at 48, and *Ward*, 491 U.S. at 791, citing *Clark*, 468 U.S. at 293 (time, place, or manner restriction on sleeping in public parks); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981) (time, place, or manner restriction on sale of religious literature); and *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) ("There is no claim * * * that the prohibition on prescription drug price advertising is a mere time, place or manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech * * * "). *See Burson v. Freeman*, 112 S.Ct. at 1858 (Kennedy, J., concurring) ("As the Court has recognized in the context of regulations of the time, place, or manner of speech, '[g]overnment regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech." ' ") (citations omitted).

the government is neutrally regulating the circumstances in which expression will occur—*viz.*, the time, place or manner of its presentation—or is covertly aiming to disadvantage or suppress particular speech or speakers. An inquiry into the government's "justification" for such a rule aids in determining whether it is really a "time, place or manner" restriction or is, in fact, something else. But that inquiry is unnecessary where, as here, a law on its face directly and explicitly discriminates against certain speech because of its content. Here, the nature of the regulation itself is enough to establish that strict scrutiny is required, regardless of the non-speech justifications the government may advance.

As the *Quincy* court observed, it "is invariably the case [that] the government can frame the interest served by [a restriction] in essentially speech-neutral terms" (768 F.2d at 1451). Were that enough to make speech restrictions "content-neutral," strict scrutiny would go the way of pterodactyls. This Court's decision in *Discovery Network* shows that this is not the law. The Court there agreed that the city's newsrack ordinance was " 'justified' by its interest in safety and aesthetics." But the Court nonetheless labeled the ordinance "content-based" and invalidated it, since it enacted an explicit preference for noncommercial publications at the expense of commercial competitors. 113 S.Ct. at 1517.

In sum, the passages appellees cite from *Renton* and *Ward* would not confer content neutrality on the must-carry law, even if that law were "justified without reference" to content, which it is not. True "time, place, or manner" restrictions do not affect who will speak or whom they will speak to; such laws leave the same speakers free to make the same speech to the same audience. The must-carry provisions cannot be so described: they have the inevitable consequence of making it difficult or impossible for certain cable programmers to speak at all. Because appellees do not defend, and could not plausibly defend, the must-carry regime as a reasonable "time, place or manner" restriction, the

"justified without reference" analysis is inapposite here. Nor, as we show below, is there any other basis for excepting the must-carry provisions from strict scrutiny.

B. The Must-Carry Provisions Fall Within No Category Of Speech Restriction That Is Exempt From Strict Scrutiny

This Court has accorded lenient review to laws regulating speech carried on the broadcast spectrum (*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)), and to laws of general applicability, like antitrust laws, that cover (among other businesses) the press. *Associated Press v. United States*, 326 U.S. 1 (1945). And the Court has applied heightened, but not strict, scrutiny to "time, place or manner" restrictions; to laws regulating commercial speech (*Central Hudson Gas & Elec. Co. v. Public Service Comm'n*, 447 U.S. 557 (1980)); and to restrictions on expressive conduct. *United States v. O'Brien*, 391 U.S. 367 (1968). The must-carry rules fit within none of these categories.

Judge Williams observed that this case presents "no issue of commercial speech" (J.S. App. 54a), and appellees could not plausibly contend otherwise. The *Associated Press* line of cases, much relied on by the government (Mot. to Aff. 10-11, 22), is likewise inapposite here. The must-carry provisions are the antithesis of a generally applicable antitrust law: they apply only to members of the press, and they regulate speech, not conduct.

Nor do the broadcast cases apply. "Spectrum scarcity" is "[t]he prevailing rationale for broadcast regulation." *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984). Because coaxial and fiber-optic cable can accommodate many voices, and because utility poles and conduit can accommodate many cable systems, "the 'scarcity rationale' has no place in evaluating government regulation of cable television." *Quincy*, 768 F.2d at 1449.[11] The government's novel

[11] *Accord, e.g., Home Box Office*, 567 F.2d at 45; *Preferred Communications, Inc. v. Los Angeles*, 754 F.2d 1396, 1404 (9th Cir. 1985), *aff'd on other grounds*, 476 U.S. 488 (1986); *Chesapeake & Potomac Tel. Co. v. United States*, No. 92-1751-A (E.D. Va. Aug. 24, 1993) (invalidating on First Amendment grounds statute prohibiting telephone companies from supplying video programming to subscribers in their service areas).

argument to the contrary—that spectrum scarcity is just one type of "market dysfunction," and that dysfunctional markets are universally subject to pervasive regulatory correction (Mot. to Aff. 20-22)—is both unprincipled and unlimited in its scope. Moreover, the Court's decision in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), shows that the government's argument is wrong. Because most cities have become "one-newspaper towns" (*id.* at 249 n.13), they would presumably be "dysfunctional markets" in the government's eyes; yet the Court forbade precisely the sort of "diversity-enhancing" regulation that Congress enacted here. The FCC itself has held that the broadcast analogy does not apply to regulation of cable television (1986 Report ¶ 184). And the Solicitor General has previously urged this Court that the *Red Lion* analysis is limited to situations involving "scarcity of the electromagnetic spectrum" and "has no application" to cable television. Brief for the United States in *Los Angeles v. Preferred Communications*, at 20 n.13.

Nor can the must-carry rules be characterized as restrictions of "expressive conduct" or "symbolic speech" within the meaning of *O'Brien* and its progeny. The law challenged in *O'Brien*—a prohibition against the knowing destruction of draft cards—"on its face deal[t] with conduct having no connection with speech" (391 U.S. at 375). It was only because O'Brien chose to express himself by engaging in the forbidden conduct that the law had the "incidental"—*i.e.*, accidental, casual, or unanticipated—effect of limiting his "speech" (*id.* at 376). "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct," the Court ruled, "a sufficiently important government interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms" (*ibid.*).

As Judge Williams said with some understatement, application of the *O'Brien* test "seems highly artificial here"

(J.S. App. 54a). The must-carry law regulates speech, not conduct; and its impact on speech is intentional and direct, not "incidental." Certain goals that Congress posited for the law—such as preventing anticompetitive practices—might be described as "economic" and conduct-related in some sense. But Congress opted to achieve those goals *by means of* a restriction on *speech*.

The must-carry law regulates speech and nothing but speech: it orders cable systems to grant preferential carriage to the programming of those persons (local broadcasters) whose speech Congress most wants the public to hear. The district court's riposte that Congress has regulated only "the means of delivery of video signals to individual receivers" (J.S. App. 12a) is altogether specious. This is not a law regulating (for example) the price of coaxial cable; it is a law that determines *whose speech* shall be carried over such cables. One might as well rationalize a law that dictated what films movie theatres must show as a law regulating the means of delivery of pulses of light to the eyes of individual theatre-goers.

The awkwardness of applying the *O'Brien* test here also demonstrates its inappositeness. The government in *O'Brien* "condemn[ed] only the independent noncommunicative impact of conduct within its reach" (391 U.S. at 382). Here, neither the alleged government interests nor the law's actual operation are confined to the "noncommunicative impact" of conduct. Indeed, it is impossible to differentiate separate " 'speech' and 'nonspeech' elements" that have been combined in a "course of conduct" properly subject to government regulation (*id.* at 376).

Laws typically evaluated under *O'Brien* are facially valid conduct regulations alleged to be unconstitutional as applied to particular expressive activity. *See O'Brien*, 391 U.S. at 375-376; *Clark*, 468 U.S. at 294, 298 (facially valid prohibition against overnight camping in parks); *Wooley v. Maynard*, 430 U.S. 705 (1977) (facially valid prohibition against obscuring characters on license plates). That is not the case here. Appellants challenge the must-carry law as a facially

unconstitutional infringement on speech; there are no distinct instances of "conduct" to which it could validly be applied.

Finally, even if cable operators were thought to engage in a distinct and regulable course of conduct—with must-carry's effects deemed "incidental" as to them—that conclusion would not apply to cable programmers like Discovery and TLC. In expressive-conduct cases generally, as in *O'Brien*, the person whose speech is "incidentally" affected is the person who *engages in* the conduct. These cases do not hold that a governmental interest in regulating one person's conduct justifies restricting someone else's speech. There is no contention here—Congress surely advanced none—that cable programmers engage in any "conduct" warranting diminution of their First Amendment rights. Cable programmers are innocent bystanders in the must-carry war; bullets that hit them deal a direct, not an incidental, blow.

In sum, the must-carry provisions cannot escape strict scrutiny as incidental restrictions on conduct properly reviewable under *O'Brien*. Nor do they resemble any other type of speech restriction traditionally accorded more lenient review. This confirms the correctness of our basic position: that the must-carry provisions are subject to exacting scrutiny as direct and discriminatory infringements of speech.

II. THE MUST-CARRY PROVISIONS ARE UNCONSTITUTIONAL UNDER THE *O'BRIEN* TEST

Declining to apply strict scrutiny, the district court (J.S. App. 22a-23a) tested the constitutionality of the must-carry regime under the standards for restrictions on expressive conduct set forth in *O'Brien*. Under those standards, the government must first prove that the challenged law "furthers an important or substantial governmental interest • • • unrelated to the suppression of free expression" (391 U.S.

at 377). Second, the government must show that the law's "incidental restriction on alleged First Amendment freedoms is no greater than is essential" to further its non-speech goals, *i.e.*, is "narrowly tailored to serve the government's legitimate • • • interests" (*O'Brien*, 391 U.S. at 377; *Ward*, 491 U.S. at 798). Contrary to the district court's conclusion, the government has borne its burden of justification on neither branch of this test. The must-carry provisions are thus unconstitutional even if *O'Brien* is thought to supply the proper standard of review.

A. The Government Has Not Demonstrated A Substantial Interest

1. The *Quincy* court properly held that "the mere abstract assertion of a substantial governmental interest, standing alone," is insufficient to justify the must-carry regime under the *O'Brien* test (768 F.2d at 1454). The government "must do something more than merely posit the existence of the disease sought to be cured"; rather, it must produce " 'a record that convincingly shows a problem to exist.' " *Id.* at 1455 (quoting *Home Box Office*, 567 F.2d at 50). The court characterized this as a "heavy burden of justification" that "the government must affirmatively bear to prove the substantiality of the interest served by the rules" (*Quincy*, 768 F.2d at 1457).

This Court has used similar language to describe the government's burden when it regulates commercial speech, which likewise requires proof of a "substantial state interest." *See Board of Trustees, SUNY v. Fox*, 492 U.S. 469, 478 (1989) (stating that commercial speech doctrine imposes no "more rigid standard" than is applicable to regulation of expressive conduct under *O'Brien*). For example, in *Edenfield v. Fane*, 113 S.Ct. 1792, 1800 (1993), the Court held that the government's burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." It is not enough that the government's "asserted interests are substantial in the abstract"; it must "demonstrate that

it is regulating speech in order to address what is in fact a serious problem" (*id.* at 1800, 1803).

2. The overriding governmental interest asserted in support of the must-carry law is preserving "the economic viability of free local broadcast television." Act § 2(a)(16). As the district court observed, this interest comprises two related, but distinct, goals. The first is to preserve "a free source of over-the-air programming [for] television viewers unwilling or unable to obtain a cable connection" (J.S. App. 9a). The second is "to ensure the continuing availability of programming with a 'local' flavor" for all television viewers (*ibid.*).[12]

The *Quincy* court assumed without deciding that, "as an abstract proposition, the preservation of free, local television service qualifies as a substantial and important governmental interest" (768 F.2d at 1454, 1459). While we have doubts that preservation of *free* television, considered in isolation, constitutes a substantial interest,[13] we will make the same

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[12] Besides stressing preservation of free local broadcasting, the Act posits the goal of promoting a "diversity of views" in the video marketplace (Act § 2(b)(1)). This latter interest seems wholly derivative of the former. Congress expressed no doubt that the range of views now available in the video market is amply diverse; indeed, Congress could scarcely have doubted its diversity, given the recent growth of broadcast TV programming (*see* page 39, *infra*) and the existence of some 130 national and regional cable programming networks (J.A. 303). Thus, unless Congress was correct in assuming that broadcast television is "seriously jeopardized" by cable (Act § 2(a)(16)), the existence of a "diversity of views" on television is not jeopardized either. Because the factual predicate needed to support the substantiality of this latter goal is the same as that required to support the interest of preserving free local broadcasting, we will not address "diversity of views" as a distinct governmental interest.

[13] People must pay to receive telephone, gas, and electric service, as well as medical care, and it is not clear that television service is more essential than these. Indeed, "free" television is something of a historical accident, if not a misnomer. In part because scrambling devices capable of interdicting signals did not exist in the early days of television, broadcasters have always financed their programming 100% with advertising revenues as opposed to subscription fees; for cable systems,

assumption that the *Quincy* court made. Thus, assuming arguendo that preserving the system of local broadcasting represents a "substantial governmental interest" in the abstract, the question is whether the government has "convincingly show[n] a problem to exist," *i.e.*, has shown that the system of local broadcasting is "seriously jeopardized" by cable (Act § 2(a)(16)).

The *Quincy* court found no evidence, as of 1985, that "the economic health of local broadcast television is threatened by cable" (768 F.2d at 1455). And the *Century* court found no evidence, as of 1987, of any threat to local broadcasting sufficient to support must-carry rules even for a five-year transition period. The key issue, therefore, is whether broadcasters' fortunes have declined so precipitously since *Quincy* and *Century* as to warrant a different conclusion now.

As Judge Williams pointed out, there was literally *no* evidence before Congress that would justify "any inference that a threat to broadcast is imminent or serious" (J.S. App. 65a, 67a). Quite the contrary: all available evidence indicates that the broadcast industry is healthier now than it was

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by contrast, the ratio between subscription fees and advertising revenues is 25:1 (J.S. App. 66a). But broadcast television is not really free: viewers pay for it both psychically (by having to endure commercials) and economically (by paying higher prices for the advertised products). Congress' fondness for "free television" is therefore just a preference for an advertiser-financed as opposed to a subscriber-financed system; an inevitable consequence of this preference is lower-quality programming, as the need to maximize advertising revenues drives broadcast fare to the lowest common denominator. In fact, the Act's retransmission-consent provision (§ 6) impugns Congress' commitment to "free" television of any sort. That provision enables broadcasters, for the first time, to demand negotiated payments from cable systems for the right to retransmit their signals; it is logical to expect that cable systems would pass such increased costs on to their subscribers. Thus, while professing to preserve "free broadcast television" for the 40% of households that do not receive cable, Congress was willing to make broadcast television more expensive for the 60% of households that do receive cable. Rather than keeping television "free," therefore, Congress is requiring the latter group to subsidize the former.

eight years ago. Since 1985, the number of cities receiving broadcast television has increased by 16% (J.S. App. 62a). According to FCC data, the total number of broadcast stations has nearly doubled during the past eight years: commercial stations have increased in number by 25%, noncommercial stations by 21%, and low-power stations by 282%.[14] Congress itself found that broadcast programming "remains the most popular programming on cable systems" (Act § 2(a)(19)).

Broadcast stations are also extremely profitable. CBS recently reported a 177% increase in third-quarter earnings, attributable in part to "a substantial increase in operating profits at the CBS Television Network"; since July 1986, the price of CBS common stock has risen 130% (from $135 to $310).[15] Capital Cities/ABC recently reported a 27% increase in third-quarter earnings, with the ABC Television Network "largely responsible for the improvement."[16] Since July 1986, the price of its common stock has risen 142% (from $256 to $619); it recently announced an offer to buy back $1 billion of its stock.[17] Among independent stations, average profits grew 366% from 1989 to 1990, continuing a positive trend since 1988. *Electronic Media*, Sept. 2, 1991, at 22. "An independent station earned average pre-tax profits of $2 million in 1992," a 133% increase from 1991. *Cable World*, Nov. 1, 1993, at 10. The consensus of investors, in short, is that broadcast television is a great place to make

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[14] *Compare* FCC News Release: Broadcast Station Totals as of December 31, 1992 (Jan. 13 1993), *with* FCC News Release: Broadcast Station Totals for July 1985 (Aug. 9, 1985).

[15] *See* Wall St. J., Oct. 14, 1993, at B10; *Electronic Media*, Oct. 18, 1993, at 14. *Compare* Standard & Poor's, *Daily Stock Quotations, NYSE*, vol. 3 (1986), *with* Wall St. J., Nov. 3, 1993, at C3.

[16] *See* Financial Times, Oct. 19, 1993, at 27.

[17] *Compare* Standard & Poor's, *Daily Stock Quotations, NYSE*, vol. 3 (1986), *with* Wall St. J., Nov. 3, 1993, at C3; *see* Wall St. J., Nov. 2, 1993, at A3. The NBC Television Network, which is owned by General Electric Co., also reported a "double digit increase" in profits for the third quarter. *Electronic Media*, Oct. 18, 1993, at 14.

money. "[N]ot only are licenses not being turned in for want of profitable opportunities, but evidently entrepreneurs continue to seek the additional licenses that the FCC makes available" (J.S. App. 62a (Williams, J., dissenting)).

Nor is it just entrepreneurs who are jumping on the bandwagon. The Fox television network was launched in 1986—one year after *Quincy* invalidated the original must-carry rules—and its annual advertising revenues have since grown to $600 million. Wall St. J., Nov. 1, 1993, at B5. And several major corporations, including Paramount Communications and Time-Warner, recently announced their intention to launch a fifth and possibly a *sixth* national broadcast network, to compete with ABC, CBS, NBC, and Fox. Wall St. J., Nov. 3, 1993, at B8.

In supposing that broadcast television is at risk, Congress noted that some cable systems on occasion have denied carriage to some broadcasters. In particular, Congress relied on a FCC survey showing that, of 4,303 cable systems studied in 1988—about half the total number—"869 systems admitted denying carriage to 704 television stations in 1,820 instances." S. Rep. 102-92, at 42 & n.102. Congress extrapolated from these data to posit 3,600 instances of non-carriage by cable systems nationwide (*id.* at 43).

This survey provides absolutely no support for an inference that local broadcasting is endangered. In 1988, there were approximately 8,500 cable systems carrying an average of eight broadcast stations each (J.A. 305). Thus, of the 68,000 broadcast signals that had been carried, 95% continued to be carried. And of those few stations that were dropped, 60%—or 425 out of 704—would not have qualified for mandatory carriage under the FCC's 1986 rules. S. Rep. 102-92, at 42-43. This translates into a 98% carriage rate for broadcast signals previously thought to deserve must-carry protection. *See* J.A. 305; J.S. App. 64a (Williams, J., dissenting). Faced with these numbers, even Congress had to admit that it "ha[d] not found that cable systems are engaging in a widespread pattern of denying carriage of local television stations." H.R. Rep. 102-628, at 52.

Even on its face, the FCC survey provides no evidence that the system of local broadcasting—as opposed to a handful of marginal broadcasters—is in peril. But the survey is equally notable for what it does not say. It contains no data, for example, about broadcast stations that were *added* to cable systems following upgrades to channel capacity. In fact, the number of broadcast stations carried by cable systems rose by 7% between 1985 and 1990 (J.A. 305). For all the FCC survey shows, therefore, the aggregate quantity of local broadcasting available on cable has increased.

More importantly, Congress provided "no information about the characteristics of the broadcasters actually dropped" or the reasons why they were dropped (J.S. App. 64a) (Williams, J., dissenting)). The most obvious reason why a cable operator would decline carriage to a supplier of video programming is that the supplier's material is unpopular with its audience. Cable viewers may find programming unattractive because it is of poor quality; because it duplicates programming offered by another station on the system (*e.g.*, where there are two network affiliates in the same market); or because the programming concerns local events in another city. *See* S. Rep. 102-92, at 43 (22% of local independent stations dropped were located more than 50 miles from the cable community). Without information on the character of the stations dropped, there is no basis for inferring a threat to the viability of local broadcasting generally. Indeed, cable operators regularly deny carriage to cable programmers, especially new ones with minimal or unproven popularity. There is no evidence—Congress certainly cited none—that broadcast programmers are treated worse than cable programmers in this respect.

3. Absent any hard evidence of an actual threat to local broadcasting, Congress resorted to speculation. Because of competition for advertising revenues, it surmised, cable systems have an "economic incentive" to drop or deny carriage to broadcast stations (Act § 2(a)(14),(15),(16)). By dropping such stations, cable operators might hope "to reduce broadcast viewership, thereby attracting advertising dollars that otherwise would go to broadcasters" (J.S. App. 12a).

This line of argument is inapt, for two distinct reasons. First, this Court has made clear that the government's burden of proving a "substantial interest" for First Amendment purposes "is not satisfied by mere speculation or conjecture"; rather, it "must demonstrate that the harms it recites are real." *Edenfield*, 113 S.Ct. at 1800. Thus, in discerning no governmental interest sufficiently substantial to justify the original must-carry rules, the *Quincy* court found the government's case to rest on "wholly speculative and unsubstantiated assumptions," including assumptions about broadcasters' loss of viewership and "advertising revenues" (768 F.2d at 1459, 1441). And the *Century* court declined to defer to what the FCC called its "sound predictive judgment" about the need for interim must-carry rules, holding that "speculative fears alone have never been held sufficient to justify trenching on First Amendment liberties" (835 F.2d at 304, 300).

In any event, Congress' speculation makes no sense even on a conjectural level. About 92% of all television advertising revenues go to broadcast stations; for cable systems, the ratio between subscription fees and advertising revenues is 25:1. *See* J.S. App. 65a, 66a (Williams, J., dissenting). Cable operators' overwhelming incentive is thus to attract subscribers, not advertisers. As Congress found, "broadcast programming * * * remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of [broadcast] signals" (Act § 2(a)(19)). It is thus wholly illogical to suppose that cable operators, in the hope of securing minuscule increments to advertising receipts, would risk reducing their greatest source of revenue--subscription fees—by denying carriage to the programming their subscribers most want to watch. Indeed, since the advertising rate a cable operator receives is directly tied to its viewership, any action that risked loss of subscribers, far from portending increased advertising revenues, would more likely yield a reduction.

The Act's retransmission-consent provision (§ 6) also undercuts the speculative concerns Congress voiced. The Act

gives each commercial broadcaster an option: it may request mandatory (but uncompensated) carriage under § 4; or it may waive its must-carry rights and demand payment for carriage under § 6. As the government acknowledges, "[i]f a broadcaster carries programming that is popular and attractive to a cable operator, there should be no reason to select the must-carry option, which is uncompensated (Mot. to Aff. 3 n.3). "The stations that need must-carry the most," in other words, "are the ones that are watched the least." *Must Carry Second Further Notice of Proposed Rulemaking*, 6 FCC Rcd. at 4576 (separate statement of Chairman Sikes).

If Congress was genuinely concerned about broadcast stations getting dropped, it is odd that it conferred on them the right, for the first time, to demand negotiated payments for carriage of their signals. Theoretically, such demands should *increase* broadcasters' chances of getting dropped. In fact, the vast majority of commercial broadcasters have waived must-carry protection and elected retransmission consent, indicating that the broadcast industry, far from being imperiled, has significant popularity and bargaining power.[18]

More specifically, the retransmission-consent provision exposes the insubstantiality of Congress' concerns about competition for advertising revenues. By definition, the most effective broadcast competitors for advertising dollars will

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[18] In the top 100 cable markets, approximately 86% of the commercial stations surveyed—network-affiliated and independent—waived must-carry protection and elected retransmission consent from at least some cable systems. *See Cable World*, Nov. 1, 1993, at 10, citing Cable Networks Inc., "Final Retransmission Consent/Must-Carry Survey" (released Oct. 18, 1993). In most of these deals, broadcasters received in-kind rather than cash consideration: they conditioned their consent to retransmission on the cable system's agreement to carry (and pay for) a new cable channel to be created by the broadcaster. *See* Wall St. J., Sept. 27, 1993, at B1; *Cable World*, Sept. 13, 1993, at 1. The retransmission-consent provision thus has exacerbated the problem posed by must-carry: instead of carrying just the broadcaster, the cable system ends up carrying *both* the broadcaster *and* its new cable affiliate, further reducing the number of channels for which unaffiliated programmers can compete.

be those with the largest audiences—the very broadcasters who will be able to demand payment for carriage and thus have no need of must-carry protection. Congress' rationale for the must-carry regime is thus ironic: the broadcasters whom cable operators allegedly have an "economic incentive" to drop are the very ones that cable operators—far from dropping—will end up paying for retransmission consent.

In short, the government has completely failed to prove that the must-carry law was enacted to address "what is in fact a serious problem" (*Edenfield*, 113 S.Ct. at 1803). Neither the FCC nor the D.C. Circuit has previously discerned any threat to local broadcasting, and the evidence that has since accumulated shows that the local broadcasting system continues to enjoy robust health. Roughly 98% of broadcast signals entitled to mandatory carriage under the FCC's 1986 rules have been carried despite those rules' invalidation. The few stations that have been dropped, and the core beneficiaries of must-carry protection, are those broadcasters that the public has evinced little desire to see. It cannot plausibly be contended that "the economic viability of free local broadcast television" (Act § 2(a)(16)) is jeopardized to the slightest degree by cable systems' disinclination to carry a handful of little-watched, marginal stations. Judge Williams thus put it succinctly: "Whatever risk there may be in the abstract has completely failed to materialize" (J.S. App. 62a).

In blessing Congress' statement to the contrary, the district court blinked reality. The excessive deference it accorded Congress' litigation-oriented "factfinding" makes heightened First Amendment scrutiny a lowly thing indeed. Congress in reality has acted, not to preserve the system of local broadcasting, but to protect particular local broadcasters. As the *Quincy* court held (768 F.2d at 1460), that does not constitute a substantial government interest.

B. The Must-Carry Provisions Are Not Narrowly Tailored

1. In order to satisfy the second prong of the *O'Brien* test, a regulation must be "narrowly tailored," *i.e.*, must

not "burden substantially more speech than is necessary to further the government's legitimate interests." *Fox*, 492 U.S. at 478. Whereas under rational-basis review a law will be sustained if it furthers a legitimate goal "without reference to whether it does so at inordinate cost," heightened scrutiny requires "the government goal to be substantial, and the cost to be carefully calculated" (*id.* at 480). "[S]ince the State bears the burden of justifying its restrictions, * * * it must affirmatively establish [a] reasonable fit" between its goal and the means chosen to accomplish it (*ibid.*). Although the government need not select the least restrictive means available, "if there are numerous and obvious less-burdensome alternatives to the restriction [chosen], that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *Discovery Network*, 113 S.Ct. at 1510 n.13.

Assuming arguendo that the government has shown a credible threat to the local broadcasting system, and hence a substantial interest in preserving it, the must-carry regime is not "narrowly tailored" to that goal. Like the rules invalidated in *Quincy*, the Act's must-carry provisions are "grossly overinclusive" (768 F.2d at 1460). They "indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator" (*ibid.*). Under the Act, as under the rules struck down in *Quincy*, a broadcaster "is entitled to carriage even if it carries no local programming at all" (*ibid.*).

Many broadcast stations in fact offer little local programming. Studies by the FCC and others indicate that broadcast stations now devote only a small percentage of their expenditures to locally-originated programming and are choosing to offer less and less of it.[19] Indeed, one class of

[19] *See* Setzer & Levy, "Broadcast Television in a Multichannel Marketplace," FCC Office of Plans and Policy (June 1991), at 36; Office of Communications of the United Church of Christ, *The Public Cost of TV Deregulation: A Study of the Decline of Informational Programming on Commercial TV* (June 17, 1991).

broadcasters entitled to must-carry protection—home-shopping networks—devote their programming almost entirely to sales presentations and have virtually no local content whatever.[20] On the other hand, "many cable systems are now providing locally originated programming services," contrary to the FCC's premise in first enacting must-carry rules (1986 Report ¶¶ 7, 34, 114). Examples of cable systems' local public affairs programming are NewsChannel 8 in the Washington, D.C. market and "New York 1," a 24-hour local news channel offered by Time-Warner in New York (J.A. 241).

In short, there is no "reasonable fit" between the end posited by Congress—preservation of local broadcasting—and the means it chose to implement that goal. All broadcasters are preferred, regardless of how little local programming they offer; and all cable programmers are discriminated against, regardless of how much local programming they provide. For this reason alone, the must-carry provisions are not "narrowly tailored" for purposes of the *O'Brien* test.

2. There are numerous and obvious less restrictive alternatives to the approach Congress adopted. If one assumes that regulation is needed to preserve local broadcast television, Congress was obligated to choose an alternative that does not disadvantage cable programmers because of the content of their speech. The common denominator of any permissible alternative, in other words, is the principle of nondiscrimination.

One option would be a more carefully crafted must-carry regime keyed to the actual quantity of local programming—from whatever source—available on a cable system. This would require Congress to define a "baseline" of localism, as the *Quincy* court required the FCC to do (768 F.2d at 1461). Under this approach, Congress or the FCC would define in objective terms the minimum amount of local pro-

[20] *See* Act § 4(g)(2) (directing FCC to consider home-shopping networks' eligibility for must-carry protection); *Cable Television Service; Cable Carriage of Home Shopping Broadcast Stations*, 58 Fed. Reg. 39156 (1993) (determining that such networks are so entitled).

gramming needed to serve the public interest, with mandatory carriage rights triggered when available local programming fell beneath that threshold. Such a "baseline" would provide a benchmark for ascertaining whether regulatory intervention is actually necessary to preserve free community-oriented television. The must-carry rules instead represent the kind of "broad prophylactic rule" that is inherently suspect in the area of First Amendment rights. *Riley*, 487 U.S. at 801 (citation omitted).

A second alternative would be an "equal access" regime of the kind suggested by Judge Williams below. A central reason why the Act's must-carry provisions "burden substantially more speech than is necessary to further the government's legitimate interests" (*Fox*, 492 U.S. at 478) is their speaker-partiality—their explicit preference for local broadcaster speech at the expense of cable programmers. Judge Williams aptly captured this vice with a hypothetical example derived from *PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980). He supposed that a city, "finding that *local* residents are an especially important source of * * * vibrant debate," passed an ordinance that limited the privilege of access "to persons living within four miles of each shopping center," thus excluding "the proverbial 'outside agitator.' " *See* J.S. App. 52a-53a. Judge Williams concluded that this discriminatory ordinance would be unconstitutional whereas the one involved in *PruneYard* was not: "mandatory access rules of [the *PruneYard*] sort give no special privilege to one set of access seekers over another" (J.S. App. 51a, 52a-53a).

By expanding the existing leased-access provisions[21] or by adopting a new equal-access model, Congress had at its

[21] As Judge Williams recognized (J.S. App. 59a), the existing leased-access provisions (47 U.S.C. § 532), like the must-carry provisions, are vulnerable to First Amendment challenge under *Tornillo* because they compromise cable operators' editorial discretion. We agree with appellants NCTA and Time-Warner that *Tornillo* and the compelled-speech cases mandate application of strict scrutiny to, and consequent invalidation of, the must-carry law. However, if the Court rejects that

disposal a variety of less restrictive alternatives to the must-carry regime. Such alternatives would be far less intrusive on First Amendment rights "in the critical sense of minimizing government interference in the choice of *who* will have access to cable" (J.S. App. 59a (Williams, J., dissenting)). In view of these alternatives, Judge Williams correctly concluded that "the must-carry rules do not provide a reasonable fit" with the goals Congress posited in the Act (*id.* at 60a).

A third alternative method of ensuring access to local broadcast television would be provisions encouraging viewers' maintenance of "switch and antenna" capability, as recommended by the FCC in 1986 and approved by the D.C. Circuit in *Century*. Unlike cable programmers, broadcasters have free access to the airwaves, and there is plainly nothing to *preclude* cable subscribers from receiving broadcast signals over the air. Indeed, Americans for decades have watched broadcast television without the benefit of cable service, and approximately 40% of the public today does not subscribe to cable. *See* H.R. Rep. 102-628, at 30 (noting that cable passes 95% of households, while only 60% subscribe). And there is no dispute that an inexpensive mechanism exists—an input-selector or "A/B switch"—which permits viewers equipped with antennas to alternate between cable and over-the-air reception of broadcast signals. In fact, these switches are built-in features of many high-quality TV sets.[22]

submission, those cases would impose no impediment to the leased-access regime either. It would then represent a viable less restrictive alternative for purposes of the *O'Brien* analysis. Although Congress found in 1992 that the original leased-access provisions had not been as effective as originally predicted in 1984, "to the extent that Congress spotted defects in [the 1984 provisions], it set out to correct them." J.S. App. 60a (Williams, J., dissenting). Section 9 of the 1992 Act amends the leased-access regime to solve the problems identified in the legislative history, clarifying the FCC's authority to set maximum reasonable rates, and relaxing burden-of-proof rules and other "cumbersome enforcement mechanism[s]." H.R. Rep. 102-628, at 39-40; S. Rep. 102-92, at 31.

[22] *See* Dealerscope Master Catalogue, June 1993, at 24 *et seq.* As a practical indication that switch-and-antenna capability is feasible, several

In 1986, the FCC concluded that switch-and-antenna capability is preferable to mandatory carriage as a long-term means of ensuring viewers' access to those few broadcast stations that cable systems do not carry voluntarily (1986 Report ¶ 138). The *Century* court not only agreed with this assessment, but concluded that consumers could acquire switch-and-antenna capability considerably faster than the five years supposed by the FCC. *See* 835 F.2d at 300-304. Indeed, the court found no basis for the FCC's assumption that consumers, "within the span of five years, * * * would not manage to purchase an inexpensive hardware-store switch upon learning that it could provide access to a considerable storehouse of new television stations and shows."

Congress in 1992 briefly considered, and rejected, the switch-and-antenna option. *See* Act § 2(a)(17) & (18). As support for this decision, it relied on a 1986 study commissioned by NAB from the ELRA Group, which purported to demonstrate the option's unworkability. S. Rep. 102-92, at 45 & n.116; *see id.* at 45 & n.114 (citing NAB testimony that relied on ELRA study). This is the same 1986 study that the *Century* court found incompetent to justify even interim must-carry rules. *See* 835 F.2d at 300-302. The court termed this study "a melange of disparate facts and findings" (*id.* at 301); observed that its results were tainted by "[s]urvey imperfections" (*id.* at 302); noted that some of its findings were expressly rejected by the FCC (*ibid.*); and concluded that the study "provides only the spongiest of foundations for the FCC's asserted justification" (*ibid.*).

Congress also relied on a 1991 study by Mark Fratrick, NAB's in-house economist, which purported to update and reconfirm the ELRA study's results. H.R. Rep. 102-628, at 54 & nn. 62, 63. But far from showing that "consumers are not willing to use A/B switches" (*id.* at 54), the Fratrick

cable systems actually distributed A/B switches to subscribers to facilitate continued over-the-air reception of any broadcast stations that "went dark" on the system after refusing retransmission consent. TCI Cablevision of Texas issued about 30,000 A/B switches to subscribers in the Corpus Christi area. *Cable World*, Oct. 18, 1993, at 51. Other cable systems issued vouchers entitling subscribers to 10% discounts on A/B switches at Radio Shack. *CableFax*, Sept. 8, 1993, at 1.

survey supports precisely the opposite conclusion. Whereas the ELRA study estimated that only 12.5% of cable subscribers had hooked-up antennas, the Fratrick study reveals that this percentage had grown to 33% as of 1991—an increase of 164%. Whereas the ELRA study estimated that only 1% of cable subscribers were equipped with an outdoor antenna and A/B switch, the Fratrick survey shows that this percentage had risen to 16% by 1991—an increase of 1500%. And whereas the ELRA study estimated that only 1.5% of cable households had actually used an A/B switch, the Fratrick study reveals that this percentage had grown to 6% by 1991—an increase of 300%. These large improvements in consumers' switch-and-antenna capability between 1986 and 1991 are quite remarkable: since cable systems voluntarily carried about 95% of existing broadcast signals at this time (*see* page 40, *supra*), consumers' need to acquire this capability was not particularly urgent.[23]

In sum, most of the evidence that Congress cited in dismissing the switch-and-antenna alternative had previously been considered and rejected both by the FCC and by the *Century* court. The one bit of new evidence—the 1991 Fratrick study—showed that switch-and-antenna technology was *more workable* in 1991 than it was in 1987, when both the Commission and the D.C. Circuit approved its feasibility. This technology would not in the slightest degree burden anybody's First Amendment rights, and it represents a completely feasible alternative to the must-carry regime.

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[23] Congress also relied on comments submitted by NAB during the 1986 FCC rulemaking, which alleged technical problems with A/B switches and raised cost objections to them. H.R. Rep. 102-628, at 54 n.60; S. Rep. 102-92, at 45 n.115. The FCC considered these arguments and found them to be without factual support. *See* page 12 n.3, *supra*. The *Century* court reached the same conclusion. *See* 835 F.2d at 296 (discussing cost of switch-and-antenna capability); *id.* at 302 (dismissing technical objections).

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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